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Sixth report on responsibility of international organizations*

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I. Introduction

1. In its work on "Responsibility of international organizations" the International Law Commission has so far adopted 45 draft articles.[1] These build up Part One (articles 1 to 30) and Part Two (articles 31 to 45), respectively concerning "The internationally wrongful act of an international organization" and "Content of the international responsibility of an international organization".

2. Many of these articles have been the object of comments after their provisional adoption, especially in the debates held in the Sixth Committee on the report of the International Law Commission and in written statements made by States and international organizations. Moreover, certain articles have been examined in judicial practice. Articles 3 and 5 were considered by the European Court of Human Rights in two recent decisions, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*[2] and then in *Berić and others v. Bosnia and Herzegovina*.[3] Article 5 and the related commentary were referred to by the House of Lords in its judgment in *Regina (Al-Jedda) v. Secretary of State for Defence*.[4]

3. As was observed by the present writer in his fifth report and for the reasons there stated,[5] the International Law Commission should be given an opportunity, before completing its first reading of the present draft, to review the texts that have been provisionally adopted in the light of all the available comments. The next report will contain a comprehensive survey of those comments and make some proposals for revising certain articles. The same report will also address all extant issues and propose a few general provisions to be included in Part Four. One of those remaining issues is the question of the existence of special rules which may take into account the peculiar features of certain organizations.

4. The present sixth report continues the examination of matters relating to the international responsibility of international organizations following the general pattern that the Commission adopted in the articles on the responsibility of States for internationally wrongful acts.[6] Part Three of those articles considers "The implementation of the international responsibility of a State"; the corresponding Part in the present study discusses issues relating to the implementation of international responsibility of international organizations. After the introduction, it includes two chapters, respectively headed "Invocation of the responsibility of an international organization" and "Countermeasures".

5. Certain critics of the current draft articles have used as a mantra the refrain that the Commission is basically replacing the term "State" with "international

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[1] The text of the draft articles so far adopted is reproduced in *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, para. 343.

[2] Decision of 2 May 2007, paras. 29-33 and 121. This decision was referred to in the Sixth Committee by Denmark, intervening on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 102), and Greece (A/C.6/62/SR.19, paras. 9-10). I had already recalled it during the debates in the Commission in the fifty-ninth session (A/CN.4/SR.2932).

[3] Decision of 16 October 2007, paras. 8, 9 and 28.

[4] Judgment of 12 December 2007, [2008] *The Weekly Law Reports*, vol. 2, p. 31 (per Lord Bingham of Cornhill).

[5] A/CN.4/583, paras. 3-6.

[6] *Yearbook of the International Law Commission 2001*, vol. II (Part Two), pp. 26-30.

organization" in the articles on State responsibility.[7] It may therefore be useful to recall once again that neither the Special Rapporteur nor the Commission has started from a presumption that the solutions adopted with regard to States should also apply to international organizations: I said as much already in my first report.[8] Any question was going to be, and has been, examined on its merits. Only when a question relating to the responsibility of international organizations appeared to be parallel to one that had already been examined with regard to States and there was no reason for stating a different rule was an identical solution adopted. Needless to say, some of the Commission's conclusions may seem questionable. There is no wish on my part to discourage informed criticism and suggestions for improvements on the part of any commentator. The present endeavour is a collective work, the purpose of which is to produce a text that could be of some use in international relations.

II. Invocation of the responsibility of an international organization

6. Implementation of the responsibility of an international organization is here considered only in so far as responsibility may be invoked by a State or another international organization. Since, according to article 36 of the current draft, the international obligations set out in Part Two only concern the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole,[9] it seems unnecessary to specify in Part Three that the scope of the articles on implementation of responsibility is similarly limited. The same approach was taken when drafting the articles on the responsibility of States for internationally wrongful acts. These do not include in Part Three any provision stating that implementation of responsibility is covered only in so far as responsibility is invoked by another State. This limitation of the scope of Part Three could be taken as implied by article 33,[10] which corresponds to article 36 of the current draft.

7. In most cases, responsibility may be invoked only by an entity which could be considered as injured. Determining when a State may be regarded as injured could hardly vary according to whether the responsible entity is a State or an international organization. Thus, the definition of "injured State" in article 42 on the responsibility of States for internationally wrongful acts[11] clearly applies also when a State invokes the responsibility of an international organization.

8. The possibility for an international organization to invoke, as an injured entity, the responsibility of a State was affirmed by the International Court of Justice in its

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[7] The latest in time is a remark by R. Rivier, "Travaux de la Commission du droit international (cinquante-huitième session) et de la Sixième Commission (soixante et unième session)", *Annuaire français de droit international*, vol. 52 (2006), p. 305, at p. 335. The author even assumed the existence of a decision by the Commission to align the new text on that on State responsibility ("décision de la Commission de s'aligner sur les solutions antérieures").

[8] A/CN.4/532, para. 11.

[9] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, para. 343.

[10] *Yearbook ... 2001*, vol. II (Part Two), p. 94.

[11] Ibid., p. 117.

advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, when the Court stated that it was "established that the Organization has capacity to bring claims on an international plane".[12] What the Court said with regard to a claim for reparation by the United Nations may be extended to all international organizations possessing legal personality, when an obligation owed to them has been breached, whether by a State or by another international organization.

9. The criteria for defining when an entity is injured by an internationally wrongful act of a State or an international organization do not appear to depend on the nature of that entity. Hence, an international organization would have to be considered as injured under the same conditions as a State. This would mean that an international organization may invoke the responsibility of another international organization in the three following cases: first, when the obligation breached is owed to the latter organization individually; second, when it is owed to several entities which include the latter organization, or to the international community as a whole, if the breach specially affects that organization; third, when it is owed to several entities which include the latter organization, or to the international community as a whole, and the breach radically changes the position of all the entities to which the obligation is owed. While the second and third cases are generally rare, and it may be difficult to find pertinent examples concerning international organizations, the fact that international organizations may be injured under those conditions cannot be ruled out. It is therefore necessary to include also the second and third cases in the definition of injured international organizations.

10. The definition of the injured entity should therefore consist in an adaptation of the corresponding definition in article 42 on the responsibility of States for internationally wrongful acts.[13] The following text is suggested:

Draft article 46
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured party to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) That State or the former international organization individually;

(b) A group of parties including that State or that former international organization, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State or that international organization; or

(ii) Is of such a character as radically to change the position of all the parties to which the obligation is owed with respect to the further performance of the obligation.

11. While the rules of the internal law of a State will determine which is the State organ that is competent for bringing a claim, in the case of an international

[12] *I.C.J. Reports 1949*, p. 174 at pp. 184-185.
[13] *Yearbook ... 2001*, vol. II (Part Two), p. 117.

organization reference would have to be made to the rules of the organization.[14] These will also provide whether in certain cases there is an obligation for the competent organ to bring a claim.[15] The rules of the organization will further have to be applied in order to ascertain whether an organization waived a claim or acquiesced to the termination of a claim. Since the requirement that the conduct of the organization be appraised according to its pertinent rules is of general application, it seems preferable not to make a specific reference to the rules of the organization in Part Three. This would also be consistent with the fact that the articles on the responsibility of States for internationally wrongful acts do not address the question of which State organ is to be regarded as competent for bringing or withdrawing a claim. It would be strange for the Commission to address the latter question for the first time in the present context.

12. Chapter I of Part Three of the articles on the responsibility of States for internationally wrongful acts includes some procedural rules of a general character. Two of them concern the modalities to be observed by a State when invoking the responsibility of another State with regard to notice of claims (article 43) and the loss of the right to invoke responsibility (article 45).[16] While those articles only consider claims that States may prefer against other States, there is nothing in the content of those articles that suggests that they would not be applicable also with regard to the invocation by a State of the responsibility of an international organization.

13. The situation of international organizations does not differ from that of States in respect of notice of claims and the loss of the right to invoke responsibility. It seems therefore reasonable to extend to international organizations the same rules that are expressed with regard to States in the articles on the responsibility of States for internationally wrongful acts.

14. The text of articles 43 and 45 on the responsibility of States for internationally wrongful acts should be adapted, when considering the invocation of the responsibility of an international organization, in order to cover the case in which the claimant entity is either a State or another international organization. The draft articles would then read:

Draft article 47
Notice of claim by an injured State or international organization

1. An injured State which invokes the responsibility of an international organization shall give notice of its claim to that organization.

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[14] A definition of the "rules of the organization" is contained in article 4, para. 4, of the current draft (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, para. 343).

[15] M. H. Arsanjani, "Claims against international organizations: *Quis custodiet ipsos custodes?*", *The Yale Journal of World Public Order*, vol. 7 (1980-1981), p. 131, at p. 147, raised the question whether "the international organization is under an obligation to bring international claims on behalf of its injured staff".

[16] *Yearbook ... 2001*, vol. II (Part Two), p. 119 and p. 121, respectively.

2. An injured international organization which invokes the responsibility of another international organization shall give notice of its claim to the latter organization.

3. The injured State or international organization may specify in particular:

(a) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take in accordance with the provisions of Part Two.

Draft article 48
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) The injured State or international organization has validly waived the claim;

(b) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

15. The articles on the responsibility of States for internationally wrongful acts include, between the two articles which have been considered above, an article on admissibility of claims (article 44)[17] which addresses questions relating to diplomatic protection.[18] The exercise by a State of diplomatic protection against an international organization is a rare occurrence. However, it is not inconceivable, in particular in relation to an organization that administers a territory or uses force.

16. Should a State exercise diplomatic protection against an international organization, nationality of the claim would be a first requirement. The more problematic question would be the need to exhaust local remedies. On this issue, a variety of views have been expressed in the literature, the prevailing opinion being that the local remedies rule applies when adequate and effective remedies are provided within the organization concerned.[19]

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[17] Ibid., p. 120.

[18] Diplomatic protection was defined by the Commission as "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility". In the *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* case, the International Court of Justice considered that this definition — which is contained in article 1 of the articles on "Diplomatic protection", *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 16 — "reflected" customary international law (*Judgment of 24 May 2007, Preliminary Objections*, para. 39).

[19] The applicability of the local remedies rule to claims addressed by States to international organizations was maintained by several authors: J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, vol. 8 (1962), p. 427, at pp. 454-455; P. De Visscher, "Observations sur le fondement et la mise en oeuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé*, vol. 40 (1963), p. 165, at p. 174; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (The Hague: Martinus Nijhoff, 1968), p. 238; B. Amrallah, "The international responsibility of the United

17. One can find some instances of practice in which the local remedies rule was invoked with regard to remedies existing within the European Union. Although this practice relates to claims that were addressed to the member States, one can infer that, had the responsibility of the European Union been invoked, exhaustion of remedies existing within the European Union would have been required. One of these instances of practice was a statement made on behalf of all the member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization in relation to a dispute between those States and the United States concerning measures taken for abating noise originating from aircraft. The member States of the European Union contended that the claim by the United States was inadmissible because remedies relating to the controversial European Community (EC) regulation had not been exhausted, since the measure was at the time "subject to challenge before the national courts of European Union member States and the European Court of Justice".[20]

18. Another example is provided by the judgment of the European Court of Human Rights in *Bosphorus Hava Yollary Turizm ve Ticaret Sirketi v. Ireland*. The case concerned an alleged infringement of human rights owing to the implementation in Ireland of an EC regulation. In finding that there were no

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Nations for activities carried out by the U.N.", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57, at p. 67; L. Gramlich, "Diplomatic protection against acts of intergovernmental organs", *German Yearbook of International Law*, vol. 27 (1984), p. 386, at p. 398 (more tentatively); H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd revised edition (The Hague: Martinus Nijhoff, 1995), pp. 1167-1168; P. Klein, *La responsabilité des organisations internationals dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), p. 534 ff.; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 250; K. Wellens, *Remedies against International Organizations* (Cambridge: Cambridge University Press, 2002), pp. 66-67. The same opinion was voiced by the International Law Association in its final report on "Accountability of international organisations", *Report of the Seventy-First Conference (Berlin)*, 2004. p. 213. C. Eagleton, "International organization and the law of responsibility", *Recueil des cours*, vol. 76 (1950-I), p. 323, at p. 395 considered that the local remedies rule would not be applicable to a claim against the United Nations, but only because "the United Nations does not have a judicial system or other means of 'local redress' such as are regularly maintained by states". A. A. Cançado Trindade, "Exhaustion of local remedies and the law of international organizations", *Revue de droit international et de sciences diplomatiques*, vol. 57 (1979), p. 81, at p. 108 noted that "when a claim for damages is lodged against an international organization, application of the rule is not excluded, but the law here may still develop in different directions". The view that the local remedies rule should be applied in a flexible manner was expressed by M. Pérez González, "Les organisations internationales et le droit de la responsabilité", *Revue générale de droit international public*, vol. 92 (1988), p. 63, at p. 71. C. F. Amerasinghe, *Principles of the International Law of International Organizations*, 2nd edition (Cambridge: Cambridge University Press, 2003), p. 486, considered that, since international organizations "do not have jurisdictional powers over individuals in general", it is "questionable whether they provide suitable internal remedies. Thus, it is difficult to see how the rule of local remedies would be applicable". This view, which had already been expressed in the first edition of the same book, was shared by F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas* (Madrid: Dykinson, 2002), pp. 139-140.

[20] "Oral statements and comments on the US response", 15 November 2000 (A/CN.4/545), attachment No. 18.

remedies that the applicant had failed to exhaust, the Court included a consideration of the remedies available within the European Union.[21]

19. When an international organization addresses a claim on behalf of one of its agents, whether against a State or another international organization, the requirement of nationality clearly does not apply. The local remedies rule could be relevant only in so far as the claim by the organization also concerns damage caused to one of its agents as a private individual.[22] The entitlement of an organization to make such a claim was admitted by the International Court of Justice in its advisory opinion on *Reparation of Injuries Suffered in the Service of the United Nations*.[23] However, the eventuality of this type of claim being addressed by an international organization against another international organization is clearly remote.

20. The fact that issues of admissibility concerning nationality and local remedies may conceivably arise also with regard to claims addressed to international organizations does not entail that the present draft articles should include a provision on the lines of article 44 of the articles on the responsibility of States for internationally wrongful acts.[24] That provision is essentially a reminder of the two main conditions for the exercise of diplomatic protection. It concerns a category of claims which is of considerable importance in the relations among States. Since the practical relevance of diplomatic protection with regard to State responsibility does not find a parallel in the present context, a provision on the admissibility of claims may well be omitted in the present draft. This would not imply that the requirements of nationality of claims and exhaustion of local remedies are always irrelevant when a claim is addressed against an international organization.

21. Following the pattern of the articles on the responsibility of States for internationally wrongful acts, the next question to be addressed concerns the case of a plurality of injured entities. With regard to a plurality of injured States, a provision contained in those articles (article 46) says that "[w]here several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act".[25] What is said about a plurality of States being injured by another State may clearly be extended to the case that the responsible entity is an international organization instead of a State.

22. The same approach should be taken when the injured entities are international organizations. They may be injured on their own or together with certain States. These States would likely be members of an injured organization, but may conceivably be non-members. The existence of a plurality of injured entities would

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[21] Judgment of 30 June 2005, para. 105.

[22] The local remedies rule does not apply with regard to claims concerning damage caused to agents in so far as it affects the respective State or international organization, because these matters lie outside the field of diplomatic protection. That point was stressed by J. Verhoeven, "Protection diplomatique, épuisement des voies de recours et juridictions européennes", *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), p. 1511, at p. 1517.

[23] *I.C.J. Reports 1949*, p. 174 at p. 184.

[24] The text of article 44 (referred to above in note 17) runs as follows: "The responsibility of a State may not be invoked if: (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims; (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

[25] *Yearbook ... 2001*, vol. II (Part Two), p. 123.

depend, first, on whether the obligation breached is owed to (a) two or more organizations or (b) to one or more organizations and to one or more States,[26] and, moreover, on whether the conditions that are laid down for determining whether an entity is injured by the breach of the obligation are fulfilled.

23. It follows that the content of the corresponding provision in the articles on State responsibility may be used as a model, with the adaptations necessary for the present purposes. The following text is here proposed with the intention of covering a number of cases: that of two or more States being injured; that of two or more international organizations being injured; that of one or more States and one or more international organizations being injured.

Draft article 49
Plurality of injured entities

Where several entities are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization which has committed the internationally wrongful act.

24. When an international organization is responsible for an internationally wrongful act, another entity may also be responsible for the same act. The possibility of a plurality of responsible States has been envisaged in article 47 on the responsibility of States for internationally wrongful acts.[27] The possibility of a plurality of responsible entities is even more likely when one of them is an international organization, given the existence of a variety of cases in which this may occur. In particular, there are several instances in which both an organization and its members, or some of them, may incur responsibility for the same internationally wrongful act. Articles 28 and 29 of the present draft refer to some of those instances.[28] Another case is when both the organization and its members have jointly undertaken the same obligation towards a third party and the obligation is breached.[29]

25. With regard to a plurality of responsible States, the articles on State responsibility make three points that are equally relevant when one of the responsible entities is an international organization. The first one is that the responsibility of each entity may be invoked in relation to the act. This point needs to be qualified, in view of the statement in article 29 of the present draft that when, under the conditions there provided, a member of an organization is responsible,

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[26] This may occur, for instance, with regard to certain mixed agreements concluded by the European Community and some of its member States (or all of them) with one or more non-member States, when the obligations owed to the European Community and its members have not been separated. See D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements* (Deventer: Kluwer, 1983) and J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Kluwer Law International, 2001).

[27] *Yearbook ... 2001*, vol. II (Part Two), p. 124.

[28] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, para. 343.

[29] Mixed agreements referred to in note 26 above provide an example also for this purpose, when the obligations for the European Community and its members have not been separated.

that responsibility "is presumed to be subsidiary". The concept of subsidiarity implies, in this context, that the responsibility of the member may be invoked only if the responsibility of the organization has been invoked first and to no avail or at any rate to little purpose.

26. The second and third points made in article 47 on State responsibility are generally applicable also to the case that one of the responsible entities is an international organization: the injured party is not entitled "to recover, by way of compensation, more than the damage it has suffered"; the entity that provided reparation may have a right of recourse against the other responsible entities. With regard to these points it matters little who is the responsible entity.

27. While article 47 of the articles on the responsibility of States for internationally wrongful acts provides a basis for the drafting of a text, a few adaptations seem necessary. One has to envisage the possibility that two or more organizations are responsible or that one or more organizations are responsible together with one or more States. Moreover, a proviso should cover the question of subsidiarity. Finally, the text may be slightly clearer if, unlike article 47 on State responsibility, it specified which entity may have a right of recourse. The proposed text runs as follows:

Draft article 50
Plurality of responsible entities

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each responsible entity may be invoked in relation to that act. However, if the responsibility of an entity is only subsidiary, it may be invoked only to the extent that the invocation of the primary responsibility has not led to reparation.

2. Paragraph 1:

(a) Does not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse that the entity providing reparation may have against the other responsible entities.

28. Injured entities within the meaning of article 46 of the current draft are not the only ones that may invoke responsibility. According to article 48 on the responsibility of States for internationally wrongful acts there are two cases in which a State other than an "injured" State may invoke responsibility.[30] The State in question would be entitled to request cessation of the internationally wrongful act and performance of the obligation of reparation "in the interest of the injured State or of the beneficiaries of the obligation breached". The first case envisaged in article 48 is that "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group".

29. For the purposes of invoking responsibility in the circumstances so described, the fact that the obligation in question is breached by an international organization

[30] *Yearbook ... 2001*, vol. II (Part Two), p. 126.

instead of a State appears to be immaterial. Nor does it appear relevant that the group of entities to which the obligation is owed includes an international organization. It seems reasonable that in the latter case international organizations may invoke responsibility under the same conditions applying to States.

30. One example from practice of a claim made by a non-injured State against an international organization is provided by the *European Communities — Regime for the Importation, Sale and Distribution of Bananas* case. A World Trade Organization (WTO) panel found that, although the United States had "no legal right or interest" in the case, its potential interest in trade in goods and services and its "interest in a determination of whether the EC regime is inconsistent with the requirement of WTO rules" were "each sufficient to establish a right to pursue a WTO dispute settlement proceeding".[31] The panel referred in a footnote to a provision of the articles on State responsibility adopted on first reading, which included in its definition of "injured State", "[i]f the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto".[32]

31. The second case in which, according to article 48 on State responsibility, non-injured States may request cessation of the breach and performance of the obligation of reparation is that "the obligation breached is owed to the international community as a whole". The fact that the breach is committed by an international organization instead of a State cannot make a difference in the entitlement of non-injured States to invoke responsibility. As was noted in that respect by the Organization for the Prohibition of Chemical Weapons, "there does not appear to be any reason why States — as distinct from other international organizations — may not be able to invoke the responsibility of an international organization".[33]

32. A more difficult issue is whether an international organization would be entitled to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole.

33. Practice in that regard is not very indicative. This is not only because that practice relates to action taken by international organizations in respect of States. Organizations generally respond to breaches committed by their members and act on the basis of their respective rules. This does not imply the existence for international organizations of a more general entitlement to invoke responsibility in case of a breach of an obligation towards the international community as a whole. The most significant practice in this respect appears that of the European Union, which has often stated that non-members committed breaches of obligations which appear to be owed towards the international community as a whole. For instance, a Common Position of the Council of the European Union of 26 April 2000 referred to "severe and systematic violations of human rights in Burma".[34] In most cases this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. Those measures will be discussed in the next chapter. For the present purposes, it is important to note that it is not altogether clear

[31] WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM and WT/DS27/R/HND, 22 May 1997, chap. VII, para. 7.50.

[32] Ibid., footnote 361. The quoted text is reproduced in *Yearbook ... 1996*, vol. II (Part Two), p. 62.

[33] See A/CN.4/593.

[34] *Official Journal of the European Communities*, 14 May 2000, L 122, p. 1.

whether responsibility was jointly invoked by the member States of the European Union or by the European Union as a distinct organization.

34. There is only limited literature on the question whether an international organization would be entitled to invoke responsibility in the case of a breach of an obligation towards the international community as a whole. Writings generally focus on the European Union; the views expressed appear to be divided, although the majority of authors gives a favourable answer.[35]

35. In its 2007 report to the General Assembly, the Commission asked for comments on the following question:

> "Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?"[36]

36. In the Sixth Committee the views expressed were clearly in favour of a positive answer. While certain States gave an unqualified reply to this effect,[37] a higher number of States considered that only certain organizations would be entitled to invoke responsibility: those organizations that have the mandate to protect the general interests of the international community.[38] The latter view was shared by

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[35] The opinion that at least certain international organizations could invoke responsibility in case of a breach of an obligation *erga omnes* was expressed by C.-D. Ehlermann, "Communautés européennes et sanctions internationales — une réponse à J. Verhoeven", *Revue belge de droit international*, vol. 18 (1984-1985), p. 96, at pp. 104-105; E. Klein, "Sanctions by international organizations and economic communities", *Archiv des Völkerrechts*, vol. 30 (1992), p. 101, at p. 110; A. Davì, *Comunità europee e sanzioni economiche internazionali* (Napoli: Jovene, 1993), p. 496 ff.; C. Tomuschat, "Artikel 210", in: H. von der Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th edition (Baden-Baden: Nomos, 1997), vol. 5, pp. 28-29; P. Klein, *La responsabilité..., op. cit.*, p. 401 ff.; A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las organizaciones internacionales* (Valencia: Tirant lo Blanch, 2006), p. 166. The opposite view was maintained by J. Verhoeven, "Communautés européennes et sanctions internationales", *Revue belge de droit international*, vol. 18 (1984-1985), p. 79, at pp. 89-90, and P. Sturma, "La participation de la Communauté européenne à des 'sanctions' internationales", *Revue du Marché commun et de l'Union européenne*, No. 366 (1993), p. 250, at p. 258. According to P. Palchetti, "Reactions by the European Union to breaches of *erga omnes* obligations", in: E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 219, at p. 226, "the role of the Community appears to be only that of implementing rights that are owed to its Member States".

[36] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30.

[37] See the interventions by Malaysia (A/C.6/62/SR.19, para. 75), Hungary (A/C.6/62/SR.21, para. 16), Cyprus (ibid., para. 38) and Belgium (ibid., para. 90).

[38] Thus the interventions of Argentina (A/C.6/62/SR.18, para. 64), Denmark, on behalf of the five Nordic countries (ibid., para. 100), Italy (A/C.6/62/SR.19, para. 40), Japan (ibid., para. 100), the Netherlands (A/C.6/62/SR.20, para. 39), the Russian Federation (A/C.6/62/SR.21, para. 70) and Switzerland (ibid., para. 85).

two international organizations in their written comments. The Organization for the Prohibition of Chemical Weapons wrote:

> "In the case of international organizations, the ability to invoke responsibility for violations of obligations owed to the international community as a whole could depend on the scope of the activities of the organization as defined in its constituent document. Accordingly, every 'concerned' international organization could be entitled to invoke responsibility and claim the cessation of the wrongful act to the extent that affects its mandate as set out in its constituent instrument."[39]

The Commission of the European Union voiced similar views:

> "As the international community as a whole cannot act on its own lacking centralized institutions, it is for the individual members of that community to take action against the offender on behalf and in the interest of the community. It appears to us that this right pertains in principle to all members of the international community, including international organizations as subjects of international law. However, at the same time international organizations are entrusted by their statutes to carry out specific functions and to protect certain interests only. Where the breached obligation relates to subject matters that fall outside the organization's powers and functions, there would be no compelling reason why it should be allowed to take decentralized enforcement action. For example, it is hardly conceivable that a technical transport organization should be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole."[40]

37. If one follows this logic, the possibility for an international organization of invoking responsibility for the breach of an obligation towards the international community would depend on the content of the obligation breached and on its relation to the mandate of that organization. This entitlement would not necessarily depend on the fact that the international organization is a member of the international community. It could be seen as delegated by the States that are members of the organization. The latter approach would seem in line with the following statement made by the International Court of Justice in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> "[...] international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interest whose promotion those States entrust to them."[41]

38. In order to determine when a non-injured international organization would be entitled to invoke responsibility of another international organization for the breach of an obligation towards the international community, one could use wording similar

[39] See A/CN.4/593.

[40] Ibid.

[41] *I.C.J. Reports 1996*, p. 66 at p. 78, para. 25.

to that used in article 22, paragraph 1 (a), for determining when an international organization may invoke necessity as a circumstance precluding wrongfulness.[42]

39. As a matter of drafting, while article 48 on responsibility of States for internationally wrongful acts may provide the basic model, various changes would have to be introduced in order to distinguish the entitlement that States have in invoking responsibility from the more limited entitlement of international organizations. In the last paragraph, given the absence in the proposed draft of a provision on admissibility of claims, an ambiguity in the text on State responsibility would be removed. For the present purposes, it is sufficient to extend to non-injured States or international organizations the applicability of the two provisions concerning notice of claims and the loss of the right to invoke responsibility.

40. The following text is therefore proposed:

Draft article 51
Invocation of responsibility by an entity other than an injured State or international organization

1. Any State or international organization other than an injured State or organization is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to a group of entities including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. Any State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. Any international organization that is not an injured organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and if the organization that invokes responsibility has been given the function to protect the interest of the international community underlying that obligation.

4. Any State or international organization entitled to invoke responsibility under the preceding paragraphs may claim from the responsible international organization:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 33;

(b) Performance of the obligation of reparation in accordance with Part Two, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 47 and 48 apply to an invocation of responsibility by a State or international organization entitled to do so under the preceding paragraphs.

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[42] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, para. 343.

III. Countermeasures

41. In the context of the present Part, countermeasures need to be examined in so far as they may be taken against an international organization which is responsible for an internationally wrongful act. Although the relevant practice is scarce, countermeasures are an important aspect of implementation of international responsibility which cannot be ignored in the present draft. Moreover, it would be hard to find a convincing reason for exempting international organizations from being possible targets of countermeasures.[43]

42. Practice relating to WTO offers some examples of countermeasures taken by certain States against the European Communities with the authorization of the Dispute Settlement Body: for instance by Canada in 1999 in response to the failure, on the part of the European Communities, to implement a decision concerning Canadian beef that was produced using growth hormones.[44] In another case, *United States — Import Measures on Certain Products from the European Communities*, a WTO panel considered that the suspension of concessions or other obligations that had been authorized by the Dispute Settlement Body was "essentially retaliatory in nature". The panel did not make any distinction between countermeasures taken against a State and those taken against an international organization when it observed:

> "Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on State responsibility (proportionality, etc. ... see article 43 of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU."[45]

43. These instances from practice confirm that injured States may generally take countermeasures against a responsible international organization under the same conditions applying to countermeasures against a responsible State. However, this conclusion needs to be qualified. Should an injured State intend to take countermeasures against a responsible organization of which that State is a member, the rules of the organization may impose some further restrictions or even forbid

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[43] According to J. E. Alvarez, "International organizations: accountability or responsibility?" (http://www.asil.org), the whole work of the International Law Commission on responsibility of international organizations would become "a train wreck — if, for example, the ILC's anticipated provision with respect to countermeasures directed at wrongful international organizations action will provide new justifications for those who, such as certain members of the U.S. Congress, have long been inclined to 'sanction' the UN by, for example, withholding U.S. dues". It is not clear to which internationally wrongful act that was committed by the United Nations and injured the United States the author refers. Nor is it clear whether he suggests that, although countermeasures would have to be regarded as admissible against international organizations under international law, the Commission should refrain from saying so for tactical reasons.

[44] See http://w01.international.gc.ca.

[45] WT/DS165R, 17 July 2000, para. 6.23, note 100. The reference made by the panel to the work of the International Law Commission concerns the first-reading articles on State responsibility.

countermeasures in this case. For example, when two member States of the European Communities argued that their breaches of an obligation under the European Economic Community (EEC) Treaty were justified by the fact that the Council of that organization had previously committed a breach, the Court of Justice of the European Communities stated that

> "[...] except where otherwise expressly provided, the basic concept of the [EEC] Treaty requires that the member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs."[46]

The fact that members are forbidden to take countermeasures finds in the European Communities a reason in the existing system of judicial remedies. However, restrictions may exist with regard to other international organizations even if similar remedies are not provided within the organization concerned.

44. Resort to countermeasures by an injured international organization against a responsible international organization is certainly a rare event. However, there are no reasons why an injured international organization should not have at its disposal such a significant instrument for inducing a responsible entity to comply with the obligations set out in Part Two. As was noted with regard to States, the rules of the responsible organization may restrict resort to countermeasures by an injured organization which is a member of the former organization. Moreover, also the rules of the injured organization may affect the possibility for that organization to take countermeasures against a responsible organization when the latter is a member of the former organization. Apart from these eventualities, one would have to consider whether the situation of an injured international organization is generally identical to that of an injured State or whether, as the Commission put it in a request for comments from States and international organizations, international organizations "encounter further restrictions than those that are listed in articles 49 to 53 of the articles on responsibility of States for internationally wrongful acts".[47]

45. In the Sixth Committee several States expressed the view that no distinction should be made between injured international organizations and injured States in this respect.[48] Some States, while admitting in principle that an international organization may take countermeasures like a State, stressed the need for the organization "to act within the limits of its mandate".[49] One State argued that there should exist, as an additional requirement for countermeasures to be taken by an international organization, "a close connection to the right protected by the

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[46] Judgment of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, joined cases 90/63 and 91/63, *European Court Reports* (1964), p. 625.

[47] *Official Records of the General Assembly, Sixty-second session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30 (b).

[48] See the statements of Denmark on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 101), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 40) and Belgium (A/C.6/62/SR.21, para. 91).

[49] Thus the statement of the Russian Federation (A/C.6/62/SR.21, para. 71). Similarly, Switzerland (A/C.6/62/SR.21, para. 86) referred to the "mandate" of the organization and also to the "purpose" for which the organization was established. One may approach to these comments the suggestion by Malaysia (A/C.6/62/SR.19, para. 75) that "the Commission should consider whether additional restrictions should be imposed, taking into account the nature and legal capacity of international organizations".

obligation".[50] Another State remarked that when international organizations take countermeasures, they mainly resort to non-compliance of obligations under a treaty, but that State did not assume that there was a corresponding restriction to the possibility to resort to countermeasures.[51]

46. The rules of the organization will determine what sort of countermeasures may be taken and which organ of the organization is competent to take them. As already noted above (para. 11) with regard to the presentation and withdrawal of claims, it is not necessary to state in the draft now under discussion that the conduct of an international organization is governed by its rules. It has to be expected that an international organization will act consistently with its own rules. However, should an organization fail to apply its own rules when taking countermeasures, the legal consequence is not necessarily that countermeasures would have to be regarded as unlawful. One would have to distinguish the position of the organization towards its members from that towards non-members. With regard to non-members, the fact that a countermeasure has been taken by the international organization in breach of its own rules does not per se make the countermeasure unlawful. On the contrary, in respect of members, since the rules of the organization are applicable in the relations between the organization and its members, those rules would set out the consequence of their breach on the lawfulness of countermeasures.

47. In the present context, there is little to change, apart from some of the wording, in article 49 of the articles on the responsibility of States for internationally wrongful acts,[52] which describes the object and limits of countermeasures. For the purposes of the current draft, the text of paragraphs 1 and 2 has to be modified in order to cover countermeasures that an injured State or international organization may take against a responsible international organization. Paragraph 3 does not require any change. It seems useful to add two further paragraphs to this initial article, in order to stress the role that the rules of the organization may have in restricting or precluding countermeasures in the relations between an international organization and its members. One of the paragraphs would deal with the rules of the responsible organization and the other with the rules of the organization that invokes responsibility.

48. The following text is suggested:

Draft article 52
Object and limits of countermeasures

1. An injured State or international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

[50] See the statement of Argentina (A/C.6/62/SR.18, para. 64).
[51] This remark was made by Italy (A/C.6/62/SR.19, para. 41).
[52] *Yearbook ... 2001*, vol. II (Part Two), p. 129.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Where an international organization is responsible for an internationally wrongful act, an injured member of that organization may take countermeasures against the organization only if this is not inconsistent with the rules of the same organization.

5. Where an international organization which is responsible for an internationally wrongful act is a member of the injured international organization, the latter organization may take countermeasures against its member only if this is not inconsistent with the rules of the injured organization.

49. Countermeasures taken against an international organization involve by definition the non-performance by the injured State or international organization of one of its obligations, that is conduct which would, but for the previous breach, injure the responsible organization. Should the injured State or international organization not be under an obligation to take a certain conduct, that conduct would per se be lawful and therefore could not be considered a countermeasure.

50. Article 50 of the articles on the responsibility of States for internationally wrongful acts[53] contains a list of obligations that a State may not lawfully breach when it takes countermeasures against another State. These are obligations that because of their importance have to be respected even when a State has been previously injured by a breach. The importance of the obligations concerned does not change according to the subject to whom they are owed; most of them can any way be characterized as obligations towards the international community as a whole. Thus, the list is clearly relevant also when an injured State intends to take countermeasures against an international organization.

51. Given the importance of the obligations that are listed, similar restrictions would seem to apply also to injured international organizations, even if some of the obligations that are mentioned in the list are of little relevance to most organizations. This is in particular the case of the obligation concerning "inviolability of diplomatic or consular agents, premises, archives and documents". No doubt, international organizations have a more significant and parallel concern that should also be taken into account in the present context. The commentary concerning article 50 explains that the restriction in question seeks to protect diplomatic and consular agents from the risk of being "targeted by way of countermeasures" to which they might otherwise be exposed.[54] A similar risk exists for agents of international organizations. The same may be said of the premises, archives and documents of international organizations. These terms and the term "agents" are wide enough to include any mission that an international organization would send, permanently or temporarily, to another organization or a State. It seems therefore reasonable to reword the restriction in subparagraph 2 (b) and refer to the inviolability of agents, premises, archives and documents of the responsible international organization.

[53] Ibid., p. 131.
[54] Ibid., p. 134.

52. The drafting of paragraph 2 of article 50 on State responsibility needs some adaptations. The text, which includes the change proposed in the previous paragraph, could run as follows:

Draft article 53
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between the injured State or international organization and the responsible international organization;

(b) To respect the inviolability of the agents of the responsible international organization and of the premises, archives and documents of the same organization.

53. When considering conditions and modalities of countermeasures that an injured State intends to take against a responsible State, articles 51 to 53 on the responsibility of States for internationally wrongful acts[55] embody certain principles that have a general character. The first article states the requirement of proportionality; the following provision concerns the procedural conditions for resorting to countermeasures; in a rather self-evident statement, the third article considers termination of countermeasures. The principles embodied in these articles appear to be equally relevant when an injured State or international organization takes countermeasures against a responsible international organization. Moreover, a uniform regime of the questions dealt with in these articles, whether they are taken against a responsible State or a responsible international organization, would have a practical advantage. Thus, also the arguably innovative elements that article 52 on State responsibility introduces with regard to the procedural conditions for resorting to countermeasures should be extended to countermeasures that are taken against an international organization.

54. The requirement of proportionality was restated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case. The Court was considering a measure taken by one State against another, but made a more general appraisal of proportionality, saying that "an important consideration is that the effect of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[56] The requirement of proportionality may be of particular significance when countermeasures are taken by an international organization, given the potential involvement of all its members. As was noted by

[55] Ibid., pp. 134-137.

[56] *I.C.J. Reports 1997*, p. 7 at p. 56, para. 85.

Belgium, "the transposition of that requirement to international organizations would [...] prevent countermeasures adopted by an international organization from exerting an excessively destructive impact".[57]

55. Article 51 on the responsibility of States for internationally wrongful acts may be reproduced without change. Articles 52 and 53 require certain adaptations. The following texts are proposed:

Draft article 54
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Draft article 55
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) Call upon the responsible international organization, in accordance with article 47, to fulfil its obligations under Part Two;

(b) Notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Draft article 56
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Two in relation to the internationally wrongful act.

56. Two different questions arise with regard to measures that may be taken against a responsible international organization by a State or international organization which is not injured within the meaning of article 46. The question that

[57] A/C.6/62/SR.21, para. 92.

will be examined first is parallel to the issue that was considered in article 54 on the responsibility of States for internationally wrongful acts.[58] This provision states that the chapter on countermeasures does not prejudice the right that a State may have to take "lawful measures" when it is entitled to invoke international responsibility although it is not injured. This provision concerns the category of States which are referred to in article 51 of the present draft.

57. Since article 54 on State responsibility is a "without prejudice" provision, one would clearly go beyond the purposes of the present study if one attempted to go any further when considering the measures that may be taken against a responsible international organization by a State which, although not injured, is entitled to invoke international responsibility. The only option in this respect is to restate what was said in the articles on State responsibility. However, it may be pointed out that, to the extent that these measures are per se lawful, there would not be any need to say that the right to take them is not prejudiced.

58. Article 51 of the current draft envisages the possibility that, under certain conditions, also an international organization, although not injured within the meaning of article 46, may invoke the responsibility of another international organization. Practice shows several examples of measures taken against a responsible State by an international organization which is not injured. This practice mostly originates from the European Union. For instance, after the statement, referred to above (para. 33), concerning "severe and systematic violations of human rights in Burma", the Council of the European Union prohibited "the sale, supply and export to Burma/Myanmar of equipment which might be used for internal repression of terrorism".[59] In some cases, the measures that were adopted by the European Union were not consistent with its obligations towards the responsible State and thus were considered to be justified because of a previous breach of an international obligation by that State.[60]

59. It would be difficult to give an example of measures that an international organization has taken against another international organization in similar circumstances. This does not necessarily imply that the "without prejudice" provision should not include a reference to measures taken by international organizations that are not "injured" within the meaning of article 46 of the current draft. The possibility of an international organization taking countermeasures against another international organization cannot be excluded. Moreover, the European Union has recently asserted "the right of an international organization to take countermeasures against another international organization [in] situations where the former has the statutory function to protect the interest underlying the obligation that was breached by the latter". This obligation was defined by the European Union as an "obligation owed to the international community as a whole".[61] Thus, one cannot view as totally remote the eventuality of an international

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[58] *Yearbook ... 2001*, vol. II (Part Two), p. 137.

[59] *Official Journal of the European Communities*, 14 May 2000 L 122, p. 29.

[60] This was, for instance, the case of part of the Council Regulation of 16 April 1982 concerning imports of all products originating in Argentina, *Official Journal of the European Communities*, 16 April 1982 L 102, p. 1. The view that international organizations may take countermeasures also when they are not "injured" in response to a breach of an obligation towards the international community as a whole was defended by C.-D. Ehlermann, op. cit., p. 96, at pp. 104-105; P. Klein, *La responsabilité* ..., op. cit., p. 401; A. Rey Aneiros, op. cit., p. 166.

[61] See A/CN.4/593.

organization, which is not injured by a breach of one such obligation, taking measures against another international organization which is held responsible for the breach. This confirms that it would be preferable to include international organizations among the entities whose right to take "lawful measures" is not regarded as prejudiced by the chapter concerning countermeasures.

60. The second question to be discussed in the present context is of a different nature. It concerns the situation of those members of an international organization which have transferred to that organization competence over certain matters and may find themselves, as a consequence, unable to take effective countermeasures. This situation was described by the Court of Justice of the European Communities with regard to retaliations within the WTO system in the following manner:

> "[...] in the absence of close cooperation, where a Member State, duly authorized within its sphere of competence to take cross-retaliation measures, considered that they would be ineffective if taken in the fields covered by GATS or TRIPS, it would not, under Community law, be empowered to retaliate in the field of trade in goods, since that is an area which on any view falls within the exclusive competence of the Community under Article 113 [now 133] of the [EC] Treaty. Conversely, if the Community were given the right to retaliate in the sector of goods but found itself incapable of exercising that right, it would, in the absence of close cooperation, find itself unable, in law, to retaliate in the areas covered by GATS or TRIPS, those being within the competence of the Member States."[62]

Since the European Community and its member States acquired under the WTO agreements separate rights and obligations reflecting their respective competences under EC law, the scenario envisaged by the Court of Justice has become real. It occurs also in the reverse situation of a State party to the WTO agreements intending to take countermeasures for a breach committed either by the European Community or by one or more of its member States. The matter arose, although it was not discussed, in the *European Communities — Regime for the Importation, Sale and Distribution of Bananas* case, when Ecuador was authorized to suspend certain obligations towards the member States for a breach committed by the European Community.[63]

61. A similar question may arise when a State or international organization which is not injured, but which is entitled to invoke responsibility, intends to take measures against the responsible international organization. However, in view of the fact that the right to take measures in those circumstances is covered by a "without prejudice" provision, it is not necessary to enquire whether States or international organizations would then be in a position to request an international organization of which they are members to take measures against the responsible organization or whether an international organization may then request its members to take measures.

62. The possibility for an international organization to take countermeasures on behalf of its members which have been injured has been mainly discussed with

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[62] Opinion 1/94, *European Court Reports*, 1994, p. I-5346, para. 109.

[63] This case was analysed under the aspect here discussed by J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Kluwer Law International, 2001), pp. 220-221.

regard to organizations implying a strong form of economic integration among their members, and in particular in respect of the European Union.[64] When the establishment of one such organization involves the transfer of an exclusive competence to the organization over economic matters, its members would find themselves in the position of no longer being able to resort to countermeasures, or at least to effective countermeasures, when they are injured. It is difficult to assume that, by transferring to an organization an exclusive competence over economic matters, States intend to renounce any possibility to resort to countermeasures affecting those matters. This would imply that an injured member may take measures through the organization, by requesting the organization to take measures on its behalf. The organization would then accede to this request or refuse to act in accordance with its own rules. With regard to measures that an organization may take under these circumstances, the requirement of proportionality, set out in article 54, would be of paramount importance.

63. For defining the international organizations which would be entitled to take countermeasures on behalf of their members, one could refer to the concept of regional economic integration organization. This concept has been used in article 13 of the Vienna Convention for the Protection of the Ozone Layer[65] and in a number of later treaties. If the idea of referring to regional economic integration organizations is acceptable, one would have to include a definition in article 2, which concerns the use of terms.

64. While there are some reasons in favour of allowing an injured member of an international organization to take countermeasures through the organization, there would seem to be little justification for admitting the possibility that an organization may take countermeasures outside its field of competence through its members.

65. Also, in the reverse situation, it would be difficult to admit that an injured State may take measures against an international organization when the responsibility lies not with the organization, but with one of its members. Should one consider that the injured State may target the organization when only one of its members is responsible, the State taking countermeasures would be able, as a result of its free choice, to affect an international organization that has committed no breach. Similar considerations apply with regard to the case of an injured State intending to target a member of an international organization when only that organization is responsible.

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[64] P. Klein, *La responsabilité* ..., op. cit., pp. 400-401, considered that, in view of the degree of integration of an international organization, the transfer of powers would justify the organization in taking countermeasures when a member State has been injured. For similar views, see C.-D. Ehlermann, op. cit., p. 96, at p. 106, and W. Meng, "Internationale Organisationen im völkerrechtlichen Deliktsrecht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 45 (1985), p. 324, at pp. 350-354. According to J. Verhoeven, "Communautés européennes et sanctions internationales", op. cit., p. 79, at pp. 88-90, an international organization would then not be entitled to take measures, but could implement them ("l'*exécution* le cas échéant appartiendra à l'organisation").

[65] United Nations *Treaty Series*, vol. 1513, p. 323. Article 1, para. 6, contains the following definition: "'Regional economic integration organization' means an organization constituted by sovereign States of a given region which has competence in respect of matters governed by this Convention or its protocols and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the instruments concerned."

66. The two questions here considered could be addressed in two different paragraphs in the following manner:

Draft article 57
Measures taken by an entity other than an injured State or international organization

1. This chapter does not prejudice the right of any State or international organization, entitled under article 51, paragraph 1, to invoke the responsibility of an international organization, to take lawful measures against the latter international organization to ensure cessation of the breach and reparation in the interest of the injured party or of the beneficiaries of the obligation breached.

2. Where an injured State or international organization has transferred competence over certain matters to a regional economic integration organization of which it is a member, the organization, when so requested by the injured member, may take on its behalf countermeasures affecting those matters against a responsible international organization.